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IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *et al.*,
Petitioners,

v.

WILLIAM TWOMBLY, *et al.*, Individually
and on behalf of all others similarly situated
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF THE *AMICUS CURIAE* [1]

The American Antitrust Institute (AAI) is an independent, not-for-profit organization whose mission is to increase the role of competition and sustain the vitality of the antitrust laws. The directors of the AAI have authorized this filing. The Advisory Board of the AAI consists of more than 85

[1] The parties have consented to the submission of this brief; their letters of consent have been filed with the Clerk of this Court. No person or entity other than the *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief. *Amicus* and its counsel have not been compensated for those efforts.

prominent lawyers, law professors, economists and business leaders (listed on the AAI web site: www.antitrustinstitute.org). The Advisory Board serves in a consultative capacity and their individual views may differ from the positions taken by AAI.

A decision that private Section 1 conspiracy complaints should be subject to unduly strict pleading requirements could seriously undermine a competitive economy and deny consumers the benefits of competition. Ensuring that well-settled principles of antitrust law remain applicable to private conspiracy claims is essential to vital antitrust enforcement.

ARGUMENT

Amicus Curiae the American Antitrust Institute respectfully submits that the heightened pleading standard in private antitrust conspiracy cases sought by Petitioners is not just a solution in search of a problem, but a bad solution chasing a problem that is more hypothetical than real. Far from alleging mere "parallel conduct" and a "bald assertion" of conspiracy, Pet. Br. at i, the underlying complaint in this case identifies a number of traditional "plus factors," such as motive, opportunity, and actions against self-interest, that are more than adequate to notify Petitioners of the nature of Respondents' case. The Court's unanimous opinions in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), and *Leatherman v. Tarrant County Narcotics Intel. and Coord. Unit*, 507 U.S. 163, 168 (1993), make clear that an amendment to the Rules or enactment of Congress is necessary to require more in any type of case not enumerated in Rule 9(b) or other law. This is especially so when the familiar cry of "frivolous litigation" advanced in support of restriction lacks any demonstrated basis, but the restriction if enacted would prevent the assertion of favored, meritorious claims. The judgment of the court of appeals is consistent with the fundamental public policies of adjudicating suits on

the merits and encouraging private enforcement of the antitrust laws, and should be affirmed.

I. THE COURTS ARE NOT AWASH IN FRIVOLOUS ANTITRUST CONSPIRACY CLAIMS

Petitioners assert that heightened pleading is necessary to avoid "costly" and "burdensome" litigation, and to prevent "class-action harassment, or windfall settlements." Pet. Br. at 16, 17, 22 (quotations omitted). But Petitioners cite no evidence that unmeritorious antitrust conspiracy suits plague courts or defendants frequently or at all.

A. There is No Evidence of Frivolous Antitrust Conspiracy Claims

Researchers note little empirical support for the contention that frivolous litigation of any kind is a serious problem in the Federal Courts. *See, e.g.*, Robert G. Bone, *Modeling Frivolous Suits*, 145 U. Pa. L. Rev. 519, at 596 (1997) (noting the lack of "hard empirical evidence bearing on the nature or seriousness of the problem" of frivolous litigation). Surveys of judges and lawyers suggest the opposite. One Federal Judicial Center survey found that only 16% of judges considered "groundless litigation" to be a "large or very large problem" in the Federal Courts. *See* John Shapard, et al., Federal Judicial Center, *Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure* 3 (1995). Similarly, only 21% of Federal Judges surveyed in a Harris poll considered "the number of frivolous suits and frivolous defenses without merit" to be a "major cause" of delays in litigation. *See Judges' Opinions On Procedural Issues: A Survey Of State And Federal Trial Judges Who Spend At Least Half Their Time On General Civil Cases*, 69 B.U. L. Rev. 731, 734 (1989).

Anecdotal reports of abusive litigation conspicuously omit antitrust suits. Not one price-fixing case appears among the

many horribles on parade in the *Report of the House Judiciary Committee on the Lawsuit Abuse Reduction Act of 2005*, H.R. Rep. No. 109-123 (2005), for example.[2] In contrast to the Congressional findings that have accompanied reforms in specific areas such as securities litigation, there is an "absence of similar claims of widespread abuse in antitrust cases . . . ." Edward Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading*, 21 Rev. Litig 1, 20 (2002).

B. Formal Models Do Not Predict Frivolous Antitrust Conspiracy Claims

Formal models do not predict that defendants will routinely settle unmeritorious antitrust conspiracy claims for nuisance value rather than bear the cost of discovery. In fact, they predict the opposite. In a typical cartel case that does not follow a government action,[3] only the defendant will know or have the means to discover at the outset with relative certainty whether it actually conspired. Moreover, the plaintiff usually cannot ascertain this fact through a reasonable pre-filing investigation.[4] In this circumstance, where only the defendant can usually know the merits of a potential claim

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[2] The report identifies a single case involving an antitrust allegation among a barrage of other charges arising out of a county commissioner's supposed claim that a football team violated its stadium lease by failing to be competitive. *See* H.R. Rep. No. 109-123 at n.84. (In fact, the suit's essential allegation was that the team had misled taxpayers into funding a new stadium with false information about the team's finances and intention to spend new revenues on hiring better players. *See Hamilton County Bd. of Comm'rs. v. National Football League*, 2006 WL 314493, at *14-15. (S.D. Ohio 2006).) The case was ultimately dismissed on statute of limitation grounds. *See id.* at 20-21.

[3] Private suits following a government action are expressly favored and cannot be considered frivolous. *See, e.g.*, 15 U.S.C. § 16(a) (providing that final judgments in government proceedings constitute prima facie evidence of liability in private actions).

[4] See discussion *infra* Part II.B.

and pre-filing investigation costs are large (here practically infinite) relative to the cost of determining the merits through discovery, rational plaintiffs may file meritorious and unmeritorious claims alike, but rational defendants will not settle any unmeritorious claims, and will settle some meritorious claims for less than the plaintiff's damages, while needlessly litigating others to a verdict. *See* Bone, *supra*, at 555-56. The net result of this equilibrium is not a transfer of wealth from innocent defendants to abusive plaintiffs, but from meritorious plaintiffs to guilty defendants, all at unnecessary cost to the scarce resources of the courts. *See id.* at 561-62.

The cost to plaintiffs of litigating antitrust conspiracy claims further constrains the potential for meritless filings. For all that defendants must identify and produce voluminous documents, plaintiffs must copy, store, and review them. For all that defendants must produce witnesses for deposition in far-flung locations, plaintiffs must pay court reporters and videographers to record those depositions, and lawyers must travel to and take them. Plaintiffs must also hire expert economists to opine on the existence and amount of overcharges. Private plaintiffs in non-class cases must produce their own potentially voluminous documents and subject their own witnesses to deposition discovery. In class actions, counsel must bear the substantial cost of class certification proceedings in addition to the costs of discovery and trial.[5] Lawyers who bring and lose meritless suits also bear

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[5] A study of four judicial districts by the Federal Judicial Center found that, excluding settlement-only class actions, the vast majority of cases with class allegations that settle do not settle until after class certification. *See* Thomas E. Willgang, et al., Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 179 tbl. 40 (1996).

reputational costs that may affect their ability to attract future clients or obtain future settlements.[6]

C. The Framers of the Federal Rules Deliberately Chose Not to Address Frivolous Antitrust Claims Through Heightened Pleading

Unable to justify heightened pleading on empirical or economic grounds, Petitioners contend that notice pleading in antitrust conspiracy cases is unfair. It is unjust, they claim, to subject defendants to "fishing expeditions" and "the expensive machinery of litigation" when plaintiffs do not already know all the facts necessary to establish liability. Pet. Br. at 26. But the framers of the Federal Rules expressly considered and declined to address these concerns with an exception to notice pleading for antitrust cases:

> Judge Charles Clark, the principal drafter of the Federal Rules, outlined the arguments in favor of special, more specific pleading standards for antitrust as being treble damages, and long and costly discovery and trials. In ultimately rejecting these arguments, he stated that "the intent . . . of the rules is to permit the claim to be stated in general terms."

Cavanagh, *supra*, at 15 (quoting Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 186-87 (1957)).[7]

Empirical evidence does not show that defendants are beset by vexatious cartel litigation. Anecdotal accounts do not

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[6] "Lawyers usually have access to reputational information through professional publications and personal contacts, and they have a strong incentive to screen frivolous suits, at least in contingency fee cases." Bone, *supra*, at 541.

[7] More recently, Congress considered and failed to enact an amendment to Rule 11(b)(3) eliminating the provision allowing filing of factual contentions lacking evidentiary support that are likely to have support after discovery. *See* Shapard, *supra*, at 1.

report it. Theoretical models do not predict it. If it exists, the framers of notice pleading deliberately chose not to address it. Yet to prevent it, Petitioners advance a measure that, as the next Part shows, would threaten to eliminate the historic role of private enforcement of the antitrust laws against cartels.

II. A HEIGHTENED PLEADING STANDARD IN ANTITRUST CONSPIRACY CASES WOULD UNDERMINE ESSENTIAL PRIVATE ANTITRUST ENFORCEMENT

The Clayton Act is designed to "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate." *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987). The Court has said that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1981). In recognition of this purpose, the Court has acknowledge that it "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws." *Radovich v. National Football League*, 352 U.S. 445, 454 (1957).

A. Cartels Are Already Under-deterred

The importance of private antitrust enforcement under the Clayton Act has not diminished over time despite the resources devoted to government enforcement and increased attention given by businesses to antitrust compliance. Indeed, cartel behavior remains massively under-deterred by government enforcement. A comprehensive study of detected cartel activity since the passage of the Sherman Act found average overcharges two to three times greater than the 10% United States Sentencing Guidelines presumption by every measure

in every period for every type of cartel. *See* John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices: Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513, 560-61 (2005). While falling as a result of increased antitrust enforcement, cartel overcharges after 1990 have still averaged 25%. *Id.* Moreover, the overcharge in the majority of cases that involve the most successful cartels has averaged an astonishing 75%. *Id.* at 561. Even when doubled, the Sentencing Guidelines presumption produces fines that are typically less and often far less than the overcharges cartels impose.

The threat of liability in private suits only partially mitigates this inadequacy. Even trebling the damages awarded in private suits likely does not amount to more than single actual damages. *See* Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651, 652-57 (2006). Failure to account for the time-value of money,[8] allocative efficiency losses,[9] price-sheltering by nonparticipants,[10] and several other factors,[11] makes single damages available for recovery

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[8] While pre-judgment interest is not available in antitrust cases, "[a] survey by Judge Posner found that the average cartel probably lasted for six to nine years, with an additional three to four year lag before judgment." Lande, *supra*, at 652 (citing Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365, 381 (1970)).

[9] Allocative efficiency losses include the foregone production of goods that would be sold at competitive prices. *See id.* at 653 n.7 (citing Frank Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445, 455 (1985) (finding that allocative efficiency losses were half as large as transfer effects)).

[10] Nonmembers and producers of partial substitutes may raise prices to meet those set by a successful cartel. *See id.* at 654-55 (citing 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 384-85, ¶ 347 nn.3, 4 (2d. ed. 2000)).

[11] These are "(1) the effects of the Statute of Limitations, (2) the uncompensated plaintiffs' attorneys' fees and costs, (3) the uncompensated

in antitrust cases far smaller than likely actual harm. *See id.* Indeed, in most circumstances, government and private penalties combined are unlikely to exceed single damages. *See id.* at 660-61. In the case of the heavily prosecuted vitamins cartels of the 1990s, for example, total worldwide government and private financial penalties combined amounted to less than 34% of real overcharges. *See* John M. Connor, *The Great Global Vitamins Conspiracy: Sanctions and Deterrence* 72 tbl. 12A (AAI Working Paper No. 06-02, February 22, 2006), *available at* http://www.antitrustinstitute.org/recent2/485.pdf.

Existing sanctions thus fall short of optimal deterrence. An optimally deterrent fine should equal the net harm a cartel causes (including overcharges, deadweight losses, and enforcement costs) divided by the probability of detection and conviction. *See* William H. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 656-57 (1983). Detection rates will never be 100% and are probably no more than 10% to 30%.[12] Sanctions amounting to no more and often less than actual overcharges are necessarily suboptimal. Therefore, it should not be surprising that after more than a century of antitrust enforcement in the United States, each year brings new disclosures of naked price-fixing and other

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value of plaintiffs' time spent pursuing the case, (4) the costs of the judicial system, and (5) the tax effects." *Id.* at 655 n.19.

[12] *See, e.g.*, Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 73 Rev. Econ. & Stat. 531, 535 (1991) (estimating the probability that a price-fixing conspiracy will be prosecuted by federal authorities to be at most between 13 and 17 percent in a given year); Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?*, 27 Am. Crim. L. Rev. 331, 348 (1989) (arguing that the detection rate for antitrust crimes is probably no greater than one in three or four); Connor & Lande, *supra*, at 519 (citing former Assistant Attorney General for Antitrust Douglas Ginsburg's estimate that enforcers detected as few as 10% of cartels.).

forms of illegal cartel behavior.[13] Changes in the law that would undermine the effectiveness of private antitrust enforcement would further reduce deterrence and correspondingly enhance the expected rewards of cartel behavior.

B. Particularized Pleading Will Further Undermine Deterrence

Requiring plaintiffs to plead price-fixing claims with particularity would severely undermine if not essentially eliminate the possibility of private sanctions against cartels absent a prior government conviction. Modern cartels employ extreme measures to avoid detection:

> The conspirators have discussed the criminal nature of their agreements; they have discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they have gone to great lengths to cover-up their actions—such as using code names with one another, meeting in secret venues around the world, creating false "covers"—i.e. facially legal justifications—for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy.

Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department

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[13] Speaking in late 2005, Deputy Assistant Attorney General Scott D. Hammond noted that more than 107 individuals had served prison sentences for cartel offenses since May 1999, including 18 sentenced to a total of 13,157 days in jail in FY 2005 alone; and nearly $3 billion in criminal fines had been levied since FY 1997, with over $338 million levied against 13 corporations and 20 individuals in FY 2005. *See* Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, An Update of the Antitrust Division's Criminal Enforcement Program, Speech Before the ABA Section of Antitrust Law Cartel Enforcement Round Table (Nov. 16, 2005), *available* at http://www.usdoj.gov/atr/public/speeches/213247.pdf.

of Justice, Caught in the Act: Inside an International Cartel 2, *presented at* OECD Competition Committee Working Party No. 3, Public Prosecutors Program (October 18, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/212266.pdf. Difficulty in detection is only exacerbated by the tendency of international cartels to move their meetings and communications abroad in the face of stepped-up U.S. enforcement. *See id.* at 4.

Even in the absence of such well-planned efforts to conceal, illegal horizontal conspiracies typically do not form in the full light of day, with the details of their inception open to public view. Although the government has available to it investigative tools that can sometimes uncover such details before the commencement of formal enforcement actions, private plaintiffs with only limited access to non-public information will almost never be able to bring suit independent of government action if required to allege the "when," "where," and "who" of conspiracy. Pet. Br. at 1.[14] Requiring that they do so would deal a near-fatal blow to private antitrust enforcement of even naked cartel behavior.

C. "Plus-Factor" Analysis on the Pleadings is Unworkable

Requiring alternatively that the allegations of a complaint "tend[] to exclude the possibility that the alleged conspirators acted independently," Pet. Br. at 24 (quotations omitted), applies a summary judgment standard to the pleadings, and misstates the standard at that. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), applied a heightened evidentiary standard on summary judgment when "the

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[14] *Cf. Interstate Circuit v. United States*, 306 U.S. 208, 221 (1939) ("As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors.").

factual context render[ed] [the plaintiff's] claims implausible." *Id.* at 588. "However, *Matsushita* itself said very little about proof requirements when structural evidence indicates that the offense is quite plausible and would be profitable for the defendants." Herbert Hovenkamp, *The Antitrust Enterprise* 136 (2005). "Failure to account for the distinction between rational and irrational conspiracies has led several courts to dismiss conspiracy claims incorrectly." *Id.* at 134-35. When the determination whether the alleged conspiracy would be profitable for the defendants turns on inferences to be drawn from the evidence, summary judgment is improper. *See In Re Brand Name Prescription Drugs Litig.*, 123 F.3d 599, 614 (7th Cir. 1997) (Posner, J.).

Matsushita certainly did not endorse evaluating the plausibility of a plaintiff's claim in a vacuum. "The Court did not hold [in *Matsushita*] that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." *Eastman Kodak Co. v. Image Tech. Svcs.*, 504 U.S. 451, 468 (1992).

The Petitioners' attempt to bend the *Matsushita* summary judgment standard to motions to dismiss would inevitably involve courts in precisely the sort of abstract economic theorizing that the Court enjoined in *Kodak*. In *Kodak*, the Court declined to hold the defendant's activities procompetitive as a matter of law based on plausible but unsubstantiated theoretical justifications. *See id.* at 470-71. The plaintiffs had also advanced plausible reasons why the defendant's conduct could be anticompetitive given certain market conditions. *See id.* at 473. The Court concluded that it could not decide between these competing theories as a matter of law given the "sparse" record before it. *Id.* at 486. Yet in *Kodak*, the parties had the opportunity for at least limited discovery into the actual market conditions and other factors bearing on their competing theories. *See id.* at 459.

Plaintiffs responding to a motion to dismiss will have no such opportunity.

Even where, at the outset of litigation, as much is known publicly about the relevant market as in this case, courts risk undue speculation or summary adjudication of disputed facts in applying the "tends to exclude" test on the pleadings. The District Court here simply hypothesized that market incentives against entry by Petitioners in each other's territories counterbalanced the incentives toward entry that Respondents alleged. *See Twombly v. Bell Atlantic Corp.*, 314 F. Supp. 2d 174, 184-88 (S.D.N.Y. 2003). Then it posited an innocent explanation for a statement by an executive of the Petitioners, whom the Respondents had no opportunity to depose and cross examine, that on its face contradicted the court's theoretical conclusion that entry would not be profitable. *See id.* at 188.

As in Kodak, "there is no immutable physical law—no 'basic economic reality'" that compels either of these conclusions. *See Kodak*, 504 U.S. at 471. Whether it would in fact have been profitable for the defendants to enter each other's territories, and whether their explanation of their agents' public statements are credible, depend on facts yet to be established. The District Court's opinion below is an object lesson in the impracticability of "plus-factor" analysis on the pleadings even, and perhaps especially, in cases where many pertinent facts are publicly known.

D. Many Meritorious Private Suits Against Cartels Would Not Have Been Brought Under Heightened Pleading

Requiring particularized allegations of conspiracy or applying "plus-factor" analysis to pleadings would likely have prevented suit in a number of meritorious reported cases.

Facts that would not have been known to the plaintiff at the time of filing were crucial to establishing "plus factors" supporting a verdict entered against major potato processors for conspiring to fix the price of potato futures contracts in *Strobl v. New York Merc. Exch.*, 582 F. Supp. 770 (S.D.N.Y. 1984). The court cited numerous examples of parallel conduct that it deemed "unusual" in light of the cumulative weight of facts developed through discovery and trial. *Id.* at 775-76. The plaintiff rebutted the defendants' contention that their market positions could be understood as hedging strategies with evidence that the defendants' actual needs should have put them on the opposite side of the market. *Id.* at 777. Had the defendants posed this argument as a pure matter of economic theory on the pleadings, however, it is difficult to conceive how the plaintiff could have alleged facts in good faith to rebut it.

In *Pease v. Jasper Wyman & Son (Pease I)*, 2002 WL 1974081 (Me. Super.), a Maine jury returned an $18.68 million verdict against three blueberry-processing companies for participating in a price-fixing and non-solicitation conspiracy that lowered the price paid to growers. *See Pease v. Jasper Wyman & Son (Pease II)*, 845 A.2d 552, 554 (Me. 2004).[15] The plaintiffs had no direct evidence of conspiracy after discovery and relied on "plus factors" in opposing summary judgment. *See Pease I*, 2002 WL 1974081 at *9. The plaintiffs introduced deposition testimony and pointed out a failure to produce documents to show that the defendants had affirmatively declined to solicit each-others' customers. *Id.* at *15-16. In concluding that the defendants acted against their economic self-interest, the court relied on evidence that they needed more berries to fill excess

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[15] The plaintiffs' claims arose under the Maine antitrust statute, 10 M.R.S.A. § 1101, which parallels and is interpreted according to federal case law on the Sherman Act. *Pease v. Jasper Wyman & Son (Pease I)*, 2002 WL 1974081, at *8 n.13.

processing capacity. *Id.* On the pleadings, presumably none of these facts could have been available to the plaintiffs to negative the defendants' innocent explanation that, equally plausibly, growers simply sold habitually to the same buyers out of loyalty. *See id.* at *6. The same is true respecting every other "plus factor" that the court found the plaintiffs had established in allowing their ultimately successful claims to go to a jury.

This pattern repeats through many cases in which plaintiffs have survived summary judgment on evidence of conspiracy or "plus factors" that they likely could not have alleged before obtaining discovery. *See, e.g., In Re Bulk Popcorn Antitrust Litig.*, 783 F. Supp. 2d 1194, 1196-97 (D. Minn. 1991) (evidence of communications among competitors regarding price and supplies and agreements to divide territory); *Instructional Sys. Dev. Corp. v. Aetna Cas. and Sur. Co.*, 817 F.2d 639, 645 (10th Cir. 1987) (letter from counsel for conspirator reminding co-conspirator of "special relationship"); *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1535 (11th Cir. 1987) (telex to defendant from distributor advising that "corrective action" had been taken regarding discounters); *Rosenfielde v. Falcon Jet Corp.*, 701 F. Supp. 1053, 1061 (D.N.J. 1988) ("The most probative evidence of a conspiracy to fix prices within the business jet industry is the reciprocal exchange of price information among the sales engineers of the various manufacturers, as evidenced by the Falcon Jet price list comparisons . . . and reams of deposition testimony.").

CONCLUSION

Requiring particularized allegations of conspiracy or "plus factors" that tend to exclude hypothetical justifications for plausibly concerted parallel conduct places an unwarranted burden on plaintiffs and courts. Private plaintiffs will rarely be in a position to make such allegations, and courts are not

equipped to evaluate them in the abstract. There is no reason to believe that courts or defendants are vexed by frivolous cartel allegations, and certainly no evidence that they are. Plaintiffs and their lawyers have every incentive to make such allegations judiciously rather than incur the massive cost of discovery and trial on claims of dubious merit. Requiring heightened pleading for claims of antitrust conspiracy threatens to chill litigation that benefits the public interest for little if any reciprocal benefit.

The existing "implausibility" standard and the strictures of Rule 11 are together sufficient to guard against abusive antitrust conspiracy suits and notify defendants of plaintiffs' claims. While a bare allegation of conspiracy may not be sufficient to satisfy a plaintiff's burden under Rule 8(a), a reasonably articulated statement of facts from which a conspiracy may be plausibly supposed certainly does. Petitioners' contention that the pleadings should also negative any theory of independent action that defendants might invent goes beyond the Rules, beyond precedent, and beyond reason. Amicus Curiae AAI respectfully submits that the judgment of the court of appeals should be AFFIRMED.

Respectfully Submitted,

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